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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1326

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
A CORPORATION,
Petitioner,

vs.

BERNARD FERAK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL FERAK, DECEASED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The petitioner Elgin, Joliet & Eastern Railway Company, a corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on the 30th day of November, 1973.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District is reported at 9 Ill. App. 2d 199; the opinion of the Supreme Court of Illinois is reported at 55 Ill. 2d 596. Both opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 30, 1973. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is involved under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Does a cause of action for personal injuries under § 1 of the Federal Employer's Liability Act (45 U. S. C. § 51) survive the death of the plaintiff under § 9 of the Act (45 U. S. C. § 59) for the sole benefit of an adult, non-dependent child of the decedent.

2. Is the phrase "children of such employee" in § 9 of the Act to be construed differently than the identical phrase in § 1 of the Act has been construed.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45:

§ 51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next

of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 59. Survival of Right of Action of Person Injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.

STATEMENT OF THE CASE

This is an action brought under the Federal Employer's Liability Act (45 U. S. C. § 51 *et seq.*) by Michael Ferak in his lifetime to recover damages for personal injuries sustained by him in a fall in defendant's railway yard on December 12, 1961. The suit was filed on November 2, 1964. Ferak died on May 6, 1965, leaving surviving him only an adult, married, non-dependent

son, who was not appointed as Special Administrator of his father's estate and substituted as plaintiff until October 27, 1969. Upon the assignment of the case for trial on January 22, 1970 plaintiff obtained leave to file, and filed an amended complaint, Count I of which was for his father's personal injuries, pain and suffering, and wage loss—the "survival action" under § 9 of the Act, while Count II was for wrongful death under § 1 of the Act. Defendant's motion to strike each count of the amended complaint was denied as to Count I, the survival action, but was granted as to Count II, the wrongful death count upon the ground that the three-year limitation period (45 U. S. C. § 65) had run between the date of death, May 6, 1965 and the date of filing the amended complaint, January 22, 1970.

The case proceeded to trial on Count I, and resulted in a jury verdict in favor of plaintiff for $75,000, upon which judgment was entered. Defendant's post-trial motion assigned as error, *inter alia*, the denial of the motion to strike Count I; the motion was denied, and defendant appealed.

The Appellate Court of Illinois, First District, affirmed the judgment, relying with respect to the issues presented by this petition upon the opinion of the Illinois Supreme Court in *Jensen, Admx.* v. *Elgin, Joliet & Eastern Railway Co.* (1962), 24 Ill. 2d 383.* The Illinois Supreme Court granted leave to appeal (53 Ill. 2d 605) but on appeal, affirmed the judgment below, again relying upon *Jensen*, reaffirming its holding that the phrase "children of such employee" in § 9 of the Act included an adult, non-dependent son, although such a child could not be a beneficiary of an action under § 1. The opinion of the Appellate and the Supreme Court in this case, as well as the Supreme Court's opinion in *Jensen* appear in the Appendix.

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* The judgment in *Jensen* was not final judgment reviewable by certiorari. *Bruce* v. *Tobin* (1917), 245 U. S. 18.

REASON FOR GRANTING THE WRIT

I. The Illinois Courts Have Decided a Federal Question of Substance in a Way Probably Not in Accord with the Applicable Decisions of This Court.

The construction of the phrase "the surviving widow or husband and children of such employee" in § 1 of the Act first reached this court in *Michigan Central R. Co.* v. *Vreeland* (1913), 227 U. S. 59. There the court quoted Tiffany, Death by Wrongful Act as listing the beneficiaries of wrongful death statutes as "husband, wife, minor child or parent of minor child" (page 72); again, at page 73 the Court referred to the special losses sustained by "a minor child" from the death of a parent.

The next case to reach this court was *Gulf, Colorado, etc. Ry. Co.* v. *McGinnis* (1913), 228 U. S. 173. There the decedent was survived by a widow and four children, one of whom was a married daughter "residing with and maintained by her husband", as to whom there was "neither allegation nor evidence that [she] was in any way dependent upon the decedent, nor that she had any pecuniary benefit as a result of the continuation of his life". (p. 174) The trial court refused to instruct the jury that it could not find any damages on behalf of this daughter; the jury returned its verdict apportioning one-half to the widow, and the remainder equally among the four children, including the married daughter. (pp. 174-5) The Supreme Court reversed, saying (p. 175):

> "The Court of Civil Appeals upheld this ruling, saying that 'the Federal statute expressly authorizes the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of cases lately decided by this court, the act in this

aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59; *American Railroad* v. *Didricksen*, 227 U. S. 145."

In *Chesapeake & Ohio Ry. Co.* v. *Kelly* (1916), 241 U. S. 485, this court noted that the verdict in that wrongful death action had been "apportioned among the widow and infant children of the deceased, excluding a son who had attained his majority." (p. 487)

With this well-settled construction of "children of such employee" in § 1, we come to *St. Louis Iron Mt. Ry.* v. *Craft* (1915), 237 U. S. 648. This was the first case in which this court considered the amendment of 1910. The court said (p. 657):

"On April 5, 1910, prior to the decedent's injuries the act was 'amended by adding the following section:'

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

No change was made in § 1. *Taylor* v. *Taylor*, 232 U. S. 363, 370. It continues, as before, to provide for two distinct rights of action: one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. *Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person "shall survive" to his personal representative "for the benefit of" the same relatives in whose behalf*

the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly." (Emphasis supplied)

This construction of the two sections of the Act was accepted by the leading text-writer in the field. See 2 Roberts: Federal Liabilities of Carriers (2d Ed. 1929) § 884:

> In view of the fact that the beneficiaries of the two causes of action available in case of death are described in identical language, and the construction of the statute by the Supreme Court in the Craft case, ante, as well as the further mandate of section 9 that "in such cases there shall be only one recovery for the same injury," no reason appears to doubt that the vesting of causes of action surviving by virtue of section 9 is to be tested and controlled by the same considerations found applicable in respect of actions for death under section 1. And under this interpretation of the statute it results that no cause of action would vest in a surviving relative of an employee dying after sustaining injury under conditions giving him a right of action under section 1, unless such relative was a dependent of such employee, notwithstanding the recovery which might be had in such a case would not be measured by that relative's pecuniary loss by reason of the death, but rather by the loss and suffering of the employee himself, prior to his death, as a result of his injury.

We submit that the Illinois Court completely misunderstood the import of *Craft* when it said in *Jensen* (24 Ill. 2d at 386) and reiterated in *Ferak* (55 Ill. at 599):

> In *St. Louis Iron Mountain & Southern Railway* v. *Craft*, 237 U. S. 648, 59 L. ed. 1160, the court pointed out that the basis of liability under the wrongful death provisions of section 1 is the wrong to the beneficiaries in causing their pecuniary loss. If a child has suffered no pecuniary loss then he has not been damaged and there is no basis of liability. *Gulf Colorado & Santa Fe Railway* v. *McGinnis*, 228 U. S. 173, 57 L. ed. 785.

> The basis of liability for an action which survives under section 9 is, on the other hand, the wrong to the injured employee and the measure of damages is his personal loss and suffering before he died. (*St. Louis Iron Mountain & Southern Railway* v. *Craft*, 237 U. S. 648, 59 L. ed. 1160.) Thus, the basis of liability and measure of damages that may operate to prevent some children from recovering under the wrongful death provisions of section 1 are not present in an action which survives under section 9. We are of the opinion that the word "children" has its ordinary dictionary meaning in both sections 1 and 9. The Appellate Court by construing the word "children" to mean "minor dependent children" unnecessarily placed a restriction on beneficiaries clearly designated in section 9, a restriction which exists under section 1 only because of the inherent nature of a wrongful death action.

The judgment for the wrongful death claim was not challenged on the appeal in *Craft* (237 U. S. at 654). The Illinois Court in both *Jensen* and *Ferak* totally ignored the explicit holding of this court in *Craft* that (pp. 657-8):

> Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative *'for the benefit of the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly.*" (Emphasis supplied)

The *Jensen* court reversed the Appellate Court's reliance on *Craft* (31 Ill. App. 2d 198 at 202) solely because of the difference in the measure of damages between the wrongful action and the survival action.

The contention that the beneficiaries for whose benefit the survival action under section 9, may be prosecuted differ from the beneficiaries for whose benefit the wrongful death action under section 1 may be prosecuted merely because of the difference in the measure of damages in the two sections was

rejected by the Missouri Supreme Court in *Auld* v. *Terminal R. Assn.* (1970), 463 S. W. 2d 297, where the Court said (p. 299):

> "We agree that there are two separate claims in this sort of action and that the claim under § 59 is for damages arising prior to the death of decedent. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Craft*, 237 U. S. 648, 35 S. Ct. 704, 59 L. Ed. 1160. However, *we do not see that the difference in the measure of damages in the two sections has any effect on the intention of Congress in its use of the word 'dependent' as a condition for recovery by a next of kin. It is our view that the word 'dependent' in each section has the same meaning.*" (Emphasis supplied)

Thus, to the Missouri court the word "children" as used in section 9 has the same meaning of "minor dependent children" in § 1, as the Appellate Court held in *Jensen*, 31 Ill. App. 2d 198.

The decision in *Jensen* was not reviewable by this court. *Bruce* v. *Tobin* (1917), 245 U. S. 18. But *Auld* has had the scrutiny of this court which denied certiorari. *Auld* v. *Terminal R. Assn.* (1971), 401 U. S. 940, 91 S. Ct. 938. We submit that under the *Auld* rule, thus approved, the difference in the measure of damages in the two separate actions does not result in different interpretations of the words "children" or "dependents." We submit that the Congress did not intend the anomalous result that an adult non-dependent son or daughter could not recover for the wrongful death of a parent, but could recover for physical injuries which the child did not sustain and for pain and suffering which the child did not experience and for pecuniary losses which the child did not incur.

The conflict between the *Jensen-Ferak* holding and the authoritative rulings of this court in *Craft* and in *Auld* can only be resolved by this court. The conflict presents itself in every railroad employee death case. § 9 provides:

> "There shall be only one recovery for the same injury."

If the conflict is not resolved by this court, in the typical single action containing both wrongful death and survival counts the trial and reviewing courts must choose between the *Craft* rule that the joint action is "for the benefit of the same relatives" and the *Jensen-Ferak* that the beneficiaries under the survival count may be different from those entitled to share in the wrongful death recovery. We respectfully submit that certiorari should be granted to avoid this dilemma.

Respectfully submitted,

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APPENDIX

OPINION OF ILLINOIS SUPREME COURT

Docket No. 45641

BERNARD FERAK, Special Admr., Appellee, v. ELGIN, JOLIET & EASTERN RAILWAY COMPANY, Appellant.

November 30, 1973

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

Michael Ferak suffered injuries while employed by defendant railroad as a yard worker and brought this suit under the Federal Employers' Liability Act. (45 U. S. C. sec. 51 *et seq.*) He died on May 6, 1965, and on October 27, 1969, his death was suggested of record in the trial court and his son, Bernard Ferak, as special administrator, was substituted as plaintiff. Judgment for $75,000 was entered upon a jury verdict for plaintiff. The Appellate Court for the First District affirmed (9 Ill. App. 3d 199), and we granted leave to appeal.

Defendant's arguments here are twofold: (1) that the action commenced by the decedent did not survive for the benefit of his adult, nondependent son, and (2) that the survival action was barred by failure to substitute the special administrator as party plaintiff within three years after decedent's death. Defendant concedes that its first contention would necessitate our overruling *Jensen* v. *Elgin, Joliet and Eastern Ry. Co.* (1962), 24 Ill. 2d 383, and vigorously urges us to do so.

Section 1 of the Act (section 51 of Title 45) creates two causes of action, one by the employee for negligent injury to him, and, in the event of his death from such injury, an additional cause of action "to his or her personal representative,

for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *." Section 9 of the Act (section 59 of Title 45) provides for the survival of the employee's right of action in the following terms:

> "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

In *Jensen* we pointed out the distinction between these actions, insofar as the right of an audit, nondependent child to maintain them is concerned. Quoting *Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 57 L. Ed. 417: " 'This [action for wrongful death] cause of action is independent of any action which decedent had, and includes no damages which he might have recovered for his injury if he had survived. [* * *] It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damages resulting to them, and for that only' ", and citing *St. Louis, Iron Mountain & Southern Ry.* v. *Craft,* 237 U. S. 648, 59 L. Ed. 1160, and *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173, 57 L. Ed. 785, we noted that the basis of liability under the wrongful death action is the direct wrong to the beneficiaries in causing their pecuniary loss, and that, if a child had suffered no pecuniary loss, then he had not been damaged and no basis of liability existed. We then stated: "The basis for liability for an action which survives under section 9 is, on the other hand, the wrong to the injured employee and the measure of damages is his personal loss and suffering before he died. [Citation.] Thus, the basis of liability and measure of damages that may operate to prevent some children from recovering under the wrongful death provisions of section 1 are not present in an action which survives under

section 9. We are of the opinion that the word 'children' has its ordinary dictionary meaning in both sections 1 and 9." We further noted that construing the word "children" to mean "minor, dependent children" as the appellate court had there done unnecessarily restricted the class of beneficiaries, a restriction existing in the wrongful death action only because of the nature of that action. Clearly, it has been the inability of nondependent children to demonstrate loss under this section that has precluded their recovery and not any statutory or judicial restriction placed upon children in the class for whom relief is created. (24 Ill. 2d 383, 385-86.) We adhere to *Jensen's* interpretation of sections 1 and 9, and our conclusion is in no way altered by the result reached by the Missouri Supreme Court in the case of *Auld* v. *Terminal R. R. Association (Mo. 1970)*, 463 S. W. 2d 297, *cert. denied*, 401 U. S. 940, 28 L. Ed. 2d 220, 91 S. Ct. 938, cited by defendants. *Auld* dealt with two nondependent sisters and a brother of the deceased who sought damages for his wrongful death. Obviously their recovery was properly denied since they were not "next of kin dependent upon such employee" as explicitly required by the statute.

Nor do we find merit in defendant's second contention. It is conceded that the original action was timely filed by decedent; it is the lapse of time between decedent's death and the substitution of his son and special administrator of the estate as plaintiff of which defendant complains. However, both Federal and Illinois procedural rules contemplate only delay between the suggestion of death to the court and the substitution of parties; the date of actual death is not a factor under either Rule 25(a)(1) of Federal Rules Civil Procedure or section 54(2) of the Illinois Civil Practice Act. In this case, both the suggestion of death and the substitution occurred on the same day, and, while we view the delay in substituting parties as undesirable, we find no basis here to conclude that the survival action is barred.

Accordingly, the judgment of the appellate court is affirmed.

Judgment affirmed.

OPINION OF APPELLATE COURT OF ILLINOIS

No. 55370

BERNARD FERAK, Special Administrator of the Estate of MICHAEL FERAK, Deceased,
Plaintiff-Appellee, Cross-Appellant,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY, a corporation,
Defendant-Appellant, Cross-Appellee.

December 1, 1972

MR. PRESIDING JUSTICE LORENZ delivered the opinion of the court:

Decedent brought this action under paragraph 1 of the Federal Employer's Liability Act (45 U. S. C. par. 51, *et seq.*). He died prior to trial and his son, as special administrator of his estate, was substituted as plaintiff. The cause proceeded to trial before a jury and a verdict in the amount of $75,000 was rendered in favor of plaintiff. On appeal defendant contends: (1) the cause of action for personal injuries to decedent did not survive to his adult non-dependent son; (2) the survival action was barred by failure of plaintiff to make a timely request for substitution; (3) the medical evidence will not sustain the verdict; (4) the trial court improperly allowed plaintiff to amend his complaint by adding allegations of negligence; and (5) the court improperly refused defendant's instruction relating to its duty of care. Plaintiff has withdrawn his cross-appeal.

Decedent was a man of about 60 years of age. He had worked for many years as a railroad yard worker and was physically well suited for such employment. His co-workers described him as being muscular, pleasant, healthy, active and

a hard worker who never missed a day on the job. And so it was that he went to work his evening shift on December 12, 1961. The weather on the previous days had produced alternate periods of snow, thaw and freeze resulting in very slippery conditions in the railroad yard on that evening. Although defendant made it a practice to spread salt and abrasive materials on the area around the "leads," the area in which decedent worked was not so cared for. As Harry Carnegie, one of decedent's co-workers, watched from inside a shanty, defendant walked in his normal manner through a very slippery part of the railroad yard. He carried the standard yardman's equipment. Suddenly decedent lost his footing and fell on his back. Carnegie went to decedent's aid and helped him to his feet. Decedent said he was "all right" and the two stood together for a few minutes until the train to which Carnegie was assigned came by and he left. As he left, however, he noticed that decedent was walking unusually "tilted" as if he was hurt. A short time later, Carnegie again saw decedent lying on the icy ground but this time his work demands kept him from helping. Instead, Carnegie immediately informed Mike Capella, a foreman, who went to decedent's aid. When Capella reached the scene, the decedent asked to be helped up. He rose to his feet but again fell and Capella had to carry him to a shanty.

Once at the shanty, decedent sat slumped at a table and mumbled incoherently. He also seemed to have lost the use of his left shoulder and arm. He was taken by ambulance to the hospital where he was treated by defendant's industrial physician and then by a neurosurgeon. Both of these doctors testified at trial and their testimony will be dealt with in detail later. Death came on May 6, 1965 and decedent is survived by his 39 year old non-dependent son.

Defendant contends that a cause of action which arises under paragraph 1 of the Act does not survive under paragraph 9. Paragraph 1 provides that in case of the wrongful death of such employee a cause of action accrues "to his or her personal repre-

sentative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *." Paragraph 9 provides:

> "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

It is apparent that the operative language of both sections which is relevant to the instant case is identical. Our Supreme Court has, however, in *Jensen* v. *Elgin, Joliet and Eastern Ry. Co.* (1962), 24 Ill. 2d 383, 385-386, 182 N. E. 2d 211, 213, held that these sections, although identical in language, are different in meaning and effect. The court, in holding opposite to the position advanced by defendant in the instant case stated:

> "The basis of liability for an action which survives under section 9 is, on the other hand, the wrong to the injured employee and the measure of damages is his personal loss and suffering before he died (*St. Louis Iron Mountain & Southern Railway* v. *Craft*, 237 U. S. 648, 59 L. ed. 1160). Thus, the basis of liability and measure of damages that may operate to prevent some children from recovering under the wrongful death provisions of section 1 are not present in an action which survives under section 9. We are of the opinion that the word "children" has its ordinary dictionary meaning in both sections 1 and 9. The Appellate Court by construing the word "children" to mean "minor dependent children" unnecessarily placed a restriction on beneficiaries clearly designated in section 9, a restriction which exists under section 1 only because of the inherent nature of a wrongful death action.

Defendant, however, urges that under both paragraphs 1 and 9 "children" must be "dependent" upon the deceased employee as a prerequisite to recovery. Defendant implies in its argument

that the term "next of kin" is generic and refers back to the other terms of relationship and that the use of the term "dependent" modifies "next of kin" and has the like effect of referring the modification to the other terms of relationship. In support of this theory, defendant cites *Auld* v. *Terminal R. R. Ass'n of St. Louis* (Mo. 1970), 463 S. W. 2d 297 *cert. denied* (1971), 401 U. S. 940 which it contends is a better reasoned view. That case involved an action brought under paragraph 1 of the F. E. L. A. for the benefit of two sisters and a brother of deceased, none of whom were dependent upon him. The court held that the word "dependent" had the same meaning in both paragraphs 1 and 9, and that dependency must be shown in order for "next of kin dependent upon such employee" to recover. In so holding the court stated at 463 S. W. 2d 299:

> "Plaintiff contends that she is entitled to recover because there are two separate claims for relief that arise in a death case under F. E. L. A., one for wrongful death and the other for the conscious pain and suffering of deceased; that the former requires pecuniary loss on the part of the beneficiaries but that the measure of damages for the latter is that which decedent would have recovered had he not died and therefore there need not be a showing of any pecuniary loss to the beneficiaries. We agree that there are two separate claims in this sort of action and that the claim under § 59 is for damages arising prior to the death of decedent. St. Louis, Iron Mountain & Southern Ry. Co. v. Craft, 237 U. S. 648, 35 S. Ct. 704, 59 L. ed. 1160. However, we do not see that the difference in the measure of damages in the two sections has any effect on the intention of Congress in its use of the word 'dependent' as a condition for recovery by the next of kin. It is our view that the word 'dependent' in each section has the same meaning."

We cannot be persuaded by *Auld,* since *Jensen* has determined that children need not be dependent in order to be beneficiaries of the survival action and we are bound by that decision.

Defendant urges another ground for the barring of the survival action in that it contends that the failure to substitute the special

administrator and to file an appropriate amended complaint for more than three years after deceased's death constitutes an effective bar to the action. Decedent was injured on December 12, 1961, the action was initially brought on November 2, 1964, he died on May 6, 1965 and suggestion of that death was made of record on October 27, 1969 and on that same date leave was sought to substitute as plaintiff, Bernard Ferak, Special Administrator of the Estate of Michael Ferak. That request was immediately granted. It is unnecessary to determine whether this question is governed by Fed. R. Civ. P. 25(a)(1), or par. 54(2) of the Illinois Civil Practice Act as both sections state that dismissal of the action would be appropriate only if the motion for substitution is made more than 90 days after the death is suggested of record. The motion for substitution of parties was made on the very day deceased's death was suggested of record. This amounted to diligent compliance with the rules and therefore afforded no opportunity for a dismissal of the lawsuit.

Defendant urges further, however, that the limitations found within the F. E. L. A. itself (45 U. S. C. par. 56) prohibit plaintiff from prosecuting his case. He contends that plaintiff's failure to suggest the death of record for more than four years after its occurrence bars the action in light of the statutory language which reads:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Central to defendant's contention is its belief that the cause of action "accrued" to deceased's personal representative on the date of death. The language of par. 56, however, does not indicate the giving of a cause of action where none had existed. The action "accrued" when the injuries occurred. *Rodzik* v. *New York Central R. R.* (E. D. Mich. 1959), 169 F. Supp. 803, 805. On decedent's death, the action which had accrued to him survived to his personal representative. This

clearly is not the initiation of a new cause of action, rather, it is a continuation of an old one. Thus, this contention of defendant must also fall.

Defendant next contends that the medical evidence is insufficient to sustain the verdict. A hypothetical question asked of plaintiff's duly qualified medical witness, a neurosurgeon, created a situation which included the matter brought into evidence. The witness was then asked whether a fall in a railroad yard might or could have resulted in the brain pathology described. Over defendant's objection, the witness answered affirmatively to a reasonable degree of medical certainty. A discussion outside of the presence of the jury revealed that defendant's objection was based upon a report wherein the witness, a treating physician, made specific medical findings and these comments: "known hypertention"; "Subarachnoid hemorrhage probably on a hypertensive basis"; and "either hypertension or trauma. Cannot be differentiated by me." The court overruled the objection, but stated that those matters may be brought out on cross-examination. On cross-examination the doctor testified that after initially examining the decedent, he believed that the condition resulted from hypertension. Also on May 23, 1962 and June 2, 1962 the doctor was unable to determine whether hypertension or trauma caused the subarachnoid hemorrhage.

The defense attorney then pronounced another hypothetical which added the doctor's diagnosis and comments and the testimony of Donich, a co-worker, who stated he had seen defendant walking in an unsteady manner prior to the first fall. It must be noted at this point that at the time this question was propounded Donich had not yet testified and when he did testify, his statements that he had seen decedent "sliding back and forth," "staggering" and "wobbling," was severely shaken on cross-examination. The doctor responded that these additional facts would change his opinion in that the unsteadiness prior to the first fall "might or could be due to a patho-

logical process in the brain already under way such as a stroke or a cerebrovascular accident or subarachnoid hemorrhage or whatever."

On re-direct examination the doctor testified that any abnormal walking done by defendant could have been caused by a prior unwitnessed fall and that fall could have aggravated a hypertensive condition. Further, the doctor stated that his notation that decedent's injuries could have been caused by hypertension or trauma was made before he knew all the facts and circumstances of the events of December 12, 1961.

Defendant's first contention with respect to the medical evidence relates to the hypothetical questioning of plaintiff's expert witnesss. Specifically, defendant urges that plaintiff's hypothetical question was improper in that it omitted facts within the witness' knowledge and omitted his recorded opinion that he was unable to differentiate between hypertension and trauma as the cause of decedent's condition. Defendant cites many cases supportive of his theory that the omission of the facts of a previously existing hypertensive condition rendered plaintiff's hypothetical question improper. While we agree with the principles stated in those cases, the better rule to apply to the instant case is found at I. L. P., Evidence, par. 330, which states in pertinent part:

> Where the facts are disputed, the party examining the witness may include in the hypothetical question only facts which his evidence tends to prove and ask the question based thereon, and he should not ask the question in the form of a recitation of actual facts; but it is sufficient if the hypothetical question fairly states such facts as the proof of the questioner tends to establish and fairly presents his claim or theory, since, if the question does not sufficiently cover all the points in issue, the opposing counsel has the right to change the question so as to cover facts which he contends were applicable.
>
> In other words, when the facts are disputed, either party may put the expert questions embodying disputed

> facts as his construction of the evidence would show them to be and have the opinion of the expert on the facts so assumed, and if all the relevant and material facts are not included or if the question omits facts claimed by the opposing party to have been proved the other party should call the attention of the witness to them on cross-examination, since the facts relied on and assumed in a hypothetical question put to an expert may be brought out either on direct examination or on cross-examination.

While there is no dispute over the existence of hypertension, its existence in decedent prior to December 12, 1961, is dubious as it was brought into the trial only by way of a report of the physician who had treated decedent after the accident. This report was based upon hearsay from an unknown source. Moreover, we feel that the hypothetical questions asked of the doctor by plaintiff and defendant fully and fairly presented each side's theory of the case and left the matter for the jury's determination. We find no error in this regard.

The sufficiency of the evidence to support the verdict is also challenged, but it is axiomatic that a court of review should not substitute its opinion for the finding of the trier of fact unless the holding of the finder of fact is against the manifest weight of the evidence, *i.e.*, an opposite conclusion must be clearly evident. See *Comm.* v. *Goodman* (1972), 6 Ill. App. 3d 847, 852-854, 286 N. E. 2d 758, 762-763. The instant case does not present an appropriate case for reversal. The nub of this facet of the case on appeal turns on whether the evidence of causation is sufficient to sustain the verdict. First, there is the medical evidence that to a reasonable degree of medical certainty the pathology might or could have been caused by a fall in an icy railroad yard. Carnegie's testimony that decedent walked normally prior to the first witnessed fall but than had much difficulty keeping upright supports this theory. The theory remains sound in the fact of Donich's testimony that decedent walked with an unsteady gait when he was seen that evening as there is no time sequence estab-

lished as to whether this observation took place before or after the first fall which was seen by Carnegie. Further, Donich's testimony concerning decedent's walk was considerably shaken on cross-examination. Although there was little evidence of trauma to the skull or dura, plaintiff did bring out the fact that one set of x-rays showed three "questionable" fractures. Also plaintiff's expert witness testified that a less forceful trauma than a slip or fall may bring about the same pathology found in decedent. Thus, we believe that the evidence was sufficient to support the verdict.

Defendant next contends that the lower court erred in allowing Count I of the amended complaint to be amended thereby submitting the following allegations to the jury:

> 4. That defendant was then and there guilty of one or more of the following wrongful acts:
>
> * * * * *
>
> (f) Carelessly and negligently failed to render assistance to the plaintiff's decedent or to remove him to a place of safety after defendant's employee had observed [decedent] fall on the ice and then be in an obviously incapacitated and unsteady condition, but rather the defendant allowed the plaintiff's decedent to continue walking alone, by himself in the defendant's yard at night time, when the yard was icy and slippery;
>
> (g) Carelessly and negligently, after discovering the plaintiff's decedent in an obviously incapacitated and unsteady condition walking in the defendant's freight yard at night time when the yard was icy and slippery, abandoned the plaintiff's decedent at a time when the defendant knew, or in the exercise of ordinary care ought to have known, that plaintiff's decedent would fall again.

It is fundamental that such an amendment would be appropriate if the evidence supported the allegations. We believe it does. Carnegie's testimony established that he saw decedent fall and went to his aid. Instead of taking decedent to a place of safety, Carnegie left him at trackside. Granted, decedent said

he was "O. K."; the ultimate question of negligence was for the jury to determine. There is also evidence that Donich saw decedent walking in an unsteady manner but gave him no aid. Although this testimony's value was decreased by cross-examination, its probative worth was for the jury to determine.

Defendant urges that as a matter of law those facts do not constitute sufficient basis for recovery. In support of that position defendant cites *Anderson* v. *Atchison Topeka & Santa Fe Ry.* (1948), 333 U. S. 821; *Mangrum* v. *Union Pacific R. R.* (1964), 41 Cal. Rptr. 536; *Szabo* v. *Pennsylvania R. R.* (1945), 132 N. J. L. 331, 40 A. 2d 562 and *Rival* v. *Atchison Topeka and Santa Fe Ry.* (1957), 62 N. M. 159, 306 P. 2d 648. We do not find those cases supportive of defendant's theory. In *Anderson* there is no reference to whether or not the employees who could have aided decedent therein had any managerial duties. The court merely referred to them as "employees" and made no indication of their rank in defendant's managerial hierarchy. Instead, the court in remanding the cause for further proceedings stated at 333 U. S. 823:

> We are unable to agree that had petitioner been permitted to introduce all evidence relevant under her allegations, the facts would have revealed a situation as to which a jury under appropriate instructions could not have found the decedent's exposure and consequent death were due "in whole or in part" to failure of respondent's agents to do what "a reasonable and prudent man would ordinarily have done under the circumstances of the situation."

Mangrum explains *Anderson* by saying at 41 Cal. Rptr. 543:

> Anderson holds, in effect, that the agency question as well as the question of negligence if the employees are found to be agents in the circumstances is a matter for the jury, thereby supporting the trial court's action in our case in leaving these questions to the jury.

The court went on to state:

> Only in extreme instances would it be the fellow employee's duty to report the condition of a sick employee.

* * * * *

> Thus, the court was right in leaving to the jury the determination of whether decedent's condition as it appeared to his fellow waiters was of the type which placed a duty upon them to report it.

The *Szabo* case did not specifically decide this question but merely stated as dictum "Now this emergency must arise in the presence of the employer but a superior employee in charge of the particular work is sufficient to charge the master." This statement is a far cry from the theory advanced by defendant that in all cases a co-worker's knowledge of decedent's emergent necessities could not as a matter of law be chargeable to defendant. To the same effect is the opinion of the Supreme Court of New Mexico in *Rival*.

Thus, we hold that the trial court did not err in allowing the amendment of the complaint.

Defendant lastly contends that the court erred in refusing one of its instructions which states:

> The defendant was not required under the law to furnish for the plaintiff's decedent a place to work which was absolutely safe. Its duty in that respect was only to exercise reasonable and ordinary care to provide a reasonably safe place for the plaintiff's decedent to perform the work he was performing at the time of the occurrence in question. . . .

Defendant contends this instruction was approved in *Anderson* v. *Elgin, Joliet and Eastern Ry.* (7th Cir., 1955), 227 F. 2d 91, 98 and the instruction given may well have left the jury with the impression that defendant was under a positive duty to furnish plaintiff with a reasonably safe place to work. This was not possible. The instruction actually given* was in all material respects the same as that tendered by defendant. The only differ-

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* "It was the duty of the railroad to use ordinary care to provide Michael Ferak with a reasonably safe place in which to work."

ence being the use of the term "ordinary care" instead of "reasonable care"; hardly a difference requiring reversal. Thus, we find no error in this regard.

The judgment of the circuit court is affirmed.

AFFIRMED.

DRUCKER and ENGLISH, *JJ.*, concur.

OPINION IN JENSEN

(No. 36686)

NANCY JENSEN, Admx., Appellant, *vs.* ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, Appellee.

Opinion filed March 23, 1962.—
Rehearing denied May 23, 1962.

MR. JUSTICE HOUSE delivered the opinion of the court:

The first question presented by this appeal is whether a cause of action which an injured employee has under section 1 of the Federal Employer's Liability Act (45 U. S. C. 51) will under provisions of section 9 of the act (45 U. S. C. 59) survive his death for the benefit of his adult nondependent children. Section 9 provides that "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the widow or husband and children of such employee * * *." The Appellate Court, First District, construed "children" as used in section 9 to mean "minor dependent children" and reversed a judgment of the circuit court of Cook County awarding to the personal representative of Ole Jensen, deceased, for the benefit of this three adult non-dependent children, $10,000 for damages sustained by Jensen during his lifetime. *Jensen* v. *Elgin, Joliet and Eastern Railway Co.* 31 Ill. App. 2d 198.

Section 1 of the act, after declaring the liability of common carriers by railroad in interstate or foreign commerce for negligent injuries to its employees, provides that in case of the wrongful death of such employee a cause of action accrues "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * *". The Appellate Court, after reviewing a number of decisions interpreting the wrongful death provisions of section 1, concluded that the word "children" as used in that section had

been construed to mean "minor dependent children." Since the phraseology defining the beneficiaries in section 1 is identical with that defining the beneficiaries for whose benefit an action survives under section 9 the Appellate Court held that the word "children" as used in section 9 must also be construed to mean "minor dependent children." In this we believe the court erred. An examination of the cases construing the provisions of section 1 leads us to the conclusion that the word "children" has not been given other than its ordinary meaning and that the inability of any of the beneficiaries designated in section 1 to recover is simply the result of the measure of damages and basis of liability under that section.

In *Michigan Central Railroad Co.* v. *Vreeland*, 227 U. S. 59, 57 L. ed. 417, the Supreme Court in considering the wrongful death provisions stated: "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damages resulting to them, and for that only." 227 U. S. 59, 68, 57 L. ed. 417, 421.

In *St. Louis Iron Mountain & Southern Railway* v. *Craft*, 237 U. S. 648, 59 L. ed. 1160, the court pointed out that the basis of liability under the wrongful death provisions of section 1 is the wrong to the beneficiaries in causing their pecuniary loss. If a child has suffered no pecuniary loss then he has not been damaged and there is no basis of liability. *Gulf Colorado & Santa Fe Railway* v. *McGinnis*, 228 U. S. 173, 57 L. ed. 785.

The basis of liability for an action which survives under section 9 is, on the other hand, the wrong to the injured employee and the measure of damages is his personal loss and suffering before he died. (*St. Louis Iron Mountain & Southern Railway* v. *Craft*, 237 U. S. 648, 59 L. ed. 1160.) Thus, the basis of

liability and measure of damages that may operate to prevent some children from recovering under the wrongful death provisions of section 1 are not present in an action which survives under section 9. We are of the opinion that the word "children" has it ordinary dictionary meaning in both sections 1 and 9. The Appellate Court by construing the word "children" to mean "minor dependent children" unnecessarily placed a restriction on beneficiaries clearly designated in section 9, a restriciton which exists under section 1 only because of the inherent nature of a wrongful death action.

The next issue is whether it is proper for counsel to use a formula and suggested figures in arguing that a certain sum of money should be awarded for pain and suffering. Plaintiff's counsel was permitted, over objection, to argue to the jury an hourly rate for the evaluation of the deceased's pain and suffering. He suggested that the jury in applying the formula use $1 per hour for 18 hours per day for he first year following the accident and $8 per day for the second year.

This issue, together with the same arguments as are here advanced, were presented to us in *Caley* v. *Manicke, post,* p. 390, where we hold that it was reversible error to permit counsel to use this sort of a mathematical formula in his argument to the jury. Our decision in that case is controlling here.

A question which arose at the trial below and which may arise on another trial of the damage question is whether the testimony of Dr. Spiegel was admissible. A detailed description of Dr. Spiegel's testimony is set out in *Jensen* v. *Elgin, Joliet and Eastern Railway Co.* 15 Ill. App. 2d 559.

Jensen injured his back on Thursday, July 29, 1954. He immediately reported the injury to his superior and went to the company hospital where a doctor examined him, taped his back and gave him pills to relieve his pain. He worked the remainder of that day and until August 8, 1954. He was treated by defendant's doctors until September 14, 1954 when he was discharged

from further treatment and given a back-to-work slip. He did not, however, return to work.

In the middle of August 1954, while still being treated by the company doctor, he went to Doctor Shabat who ordered a brace for his back, gave him pills to relieve his pain, and had him use a heat pad and a bed board. Doctor Zeitlin X-rayed Jensen's back at the request of Doctor Shabat. He saw Doctor Shabat about 15 times, the last visit being on June 7, 1955. Suit had been filed on January 6, 1955.

In August, 1955, he went to Doctor Spiegel at the suggestion of one of his attorneys and not at the suggestion or with the knowledge of Doctor Shabat. Jensen knew that Doctor Spiegel was to make a report to his lawyer. Doctor Spiegel knew the patient had been referred to him by the lawyer, and assumed that a suit was pending and that he might be called to testify.

Doctor Spiegel performed Nafziger, Fabere and Lesegue tests on Jensen. The responses to the first two tests were normal but the latter indicated to the doctor a possibility of a rupture of the intervertebral disc. The limitations of motion of the legs and back described during the test were based on the patient's complaint of pain and by the tensing of the hamstring muscles which are also under the voluntary control of the patient. Doctor Spiegel did not use a myelogram to ascertain whether the patient had a ruptured disc because he said it is generally used only as a preparation for surgical intervention. He did not give him any treatment, never had him go to a hospital and never had his back X-rayed.

Doctor Spiegel admitted that his diagnosis of a possible ruptured disc was based on subjective symptoms elicited from the patient, but stated that unless the patient is a good actor, an experienced observer would not be fooled. When the doctor was then told that a month after his last examination of the patient, the patient and another man moved 11,000 pounds of furniture, including a piano and refrigerators into a two-story house, the

doctor explained that he could have been fooled or the patient had a remission.

Statements of pain and symptoms are admissible as an exception to the hearsay rule, if made by a patient to a physician for purposes of diagnosis and treatment, on the theory that the desire for proper treatment outweighs any motive to falsify. (*Greinke* v. *Chicago City Railway Co.* 234 Ill. 564.) Since the cause of an injury may be a factor in diagnosis, statements of the cause of an injury or condition have been held admissible because they also fall within the guarantee of truthfulness. (*Shell Oil Co.* v. *Industrial Com.* 2 Ill. 2d 590.) Evidence of statements and physical demonstration capable of simulation are not admissible, however, if made to a physician examining for the purpose of testifying, and he is limited to testifying to purely objective conditions. *Greinke* v. *Chicago City Railway Co.* 234 Ill. 564; *Shaughnessy* v. *Holt,* 236 Ill. 485.

Doctor Spiegel testified that as a consultant he leaves the treatment of the patient to the doctor who sends the patient, unless he himself operates on the patient, and that in this case he did not prescribe the pain medication, physical therapy or corset for Jensen but merely suggested it to Doctor Shabat. The trial court thereafter permitted Doctor Spiegel to testify as a treating physician to statements concerning the medical history of the patient and the cause of the injury and to state his diagnosis which was based entirely on subjective symptoms elicited from the patient. The testimony of Jensen at the earlier trial shows that Doctor Shabat, his treating physician, did not suggest that he go to Doctor Spiegel or even know that he was going to see him. Furthermore, the last time Jensen visited Doctor Shabat was in June 1955 and the first time he visited Doctor Spiegel was in August 1955. There is nothing to indicate that Jensen thought his statements to Doctor Spiegel concerning his injury would be used as a basis for treatment by Doctor Spiegel or Doctor Shabat. Not only does the record fail to show that Doctor Spiegel

was acting as a consultant to a treating physician, but it also fails to indicate that the patient knew of such arrangement.

Doctor Spiegel appears to be an eminently qualified neurological surgeon. His diagnosis of a ruptured disc was, however, based entirely on subjective symptoms; and, as the Appellate Court pointed out, the chief purpose of the examination appears to have been to give the attorney a report on Jensen's condition with a view toward testifying. (15 Ill. App. 2d 559, 560.) The doctor's testimony under these circumstances was inadmissible. *Shaughnessy* v. *Holt,* 236 Ill. 485; *Greinke* v. *Chicago City Railway Co.* 234 Ill. 564.

The judgment of the Appellate Court for the First District is reversed, and the cause is remanded to the circuit court of Cook County for a new trial on the question of damages sustained by the deceased.

Reversed and remanded.